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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 274

MASSMAN CONSTRUCTION COMPANY, PETITIONER

v.

HARRY W. BASSETT, DEPUTY COMMISSIONER FOR THE TENTH DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION; MYRTLE BOLING; ARLINE BOLING; DELORES BOLING AND BONNIE BOLING WILLIAMS, NEE BONNIE BOLING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT BASSETT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported in 30 F. Supp. 813. The opinion of the Court of Appeals (R. 160–166) is not yet reported.

JURISDICTION

The decree of the United States Court of Appeals for the Eighth Circuit was entered May 2, 1941 (R. 167). The petition for a writ of certiorari was filed July 14, 1941. The jurisdiction

of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the territory east of the main channel of the Mississippi River bordering Ralls County, Missouri, is included within the judicial district of the United States District Court for the Eastern District of Missouri.

2. Whether for purposes of bringing injunction proceedings under section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 921 (b)) the place of injury in death cases includes both the place of death and the place of the injury resulting in the death.

3. Whether the requirement of section 21 (b) of the Act (33 U. S. C. 921 (b)) that injunction proceedings to set aside a compensation award be instituted in the judicial district in which the injury occurred may be waived.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in the Appendix, pp. 10–11.

STATEMENT

The petitioner, a Missouri corporation (R. 4–5), constructed a dam across the Mississippi River from Salverton, Ralls County, Missouri, to a point in Illinois (R. 17, 41–42, 118). Harold Boling was employed by petitioner (R. 42–44, 68, 69–70, 125–

126) as a carpenter's helper in the construction of the project (R. 37, 68, 73, 102). While so employed (R. 37–38, 68–69, 74) Boling cut his hand and wrist (R. 68, 74, 106). The accident occurred at a point in the river east of the main channel (R. 161). An infection set in and Boling died shortly thereafter in a hospital in Hannibal, Missouri (R. 60, 89–90, 98), within the territorial limits of the Eastern District of Missouri. Compensation was awarded the decedent's widow and minor children under the Longshoremen's and Harbor Workers' Compensation Act.

A bill to enjoin the award was filed by petitioner in the United States District Court for the Eastern District of Missouri (R. 4–10). The Eastern District of Missouri is defined to include the territory embraced in Ralls County, Missouri, as of July 1910 (28 U. S. C. 171), and the applicable state statute fixes the eastern boundary of Ralls County at the "middle of the main channel" of the Mississippi River.

Answers were filed by the various defendants denying the principal allegations of the complaint (R. 10–14). The right to maintain the action in the Eastern District of Missouri was not challenged.

The District Court enjoined the award on the ground that the terms of the Longshoremen's Act did not apply to the accident and injury and that the award was for that reason rendered without

jurisdiction (R. 135–140). On appeal, the Circuit Court of Appeals for the Eighth Circuit reversed and directed that the action be dismissed for want of jurisdiction of the District Court. The court held that the injury occurred east of the main channel, beyond the territorial limits of the Eastern District of Missouri, and that the requirement of section 21 (b) of the Longshoremen's Act that proceedings to enjoin an award must be instituted in the district where the injury occurred was jurisdictional and could not be waived (R. 160–166).

ARGUMENT

1. The petitioner's contention that the United States District Court for the Eastern District of Missouri has concurrent jurisdiction with the district courts of Illinois over the entire Mississippi River adjoining Ralls County is without substance. Section 91 of the Judicial Code, as amended (28 U. S. C. 171), as far as material here, limits the eastern district of Missouri to the "territory" embraced in Ralls County, and the Missouri statute describing the boundaries of Ralls County (R. S. Mo., 1929, sec. 11924) fixes the eastern boundary of that county as "the middle of the main channel of the Mississippi River."[1] It is immaterial that the enabling acts for Missouri and Illinois provided for the exercise of concurrent

[1] The finding of the court below (R. 161) that the accident occurred on the Illinois side, east of the main channel, is not challenged.

jurisdiction over the Mississippi by the two states and that a similar provision has been inserted in each of the successive constitutions of Missouri. The territorial limits of the Eastern District of Missouri are governed by the provisions of section 91 of the Judicial Code, as amended, which deal with the physical "territory" embraced in Ralls County, and not with the political or judicial jurisdiction which the county may exercise as a subdivision of the State of Missouri.[2] Cf. *Devoe Manufacturing Co.* v. *United States,* 108 U. S. 401; *United States* v. *Texas,* 162 U. S. 1, 67, 68; *Hyde* v. *Victoria Land Co.,* 125 Fed. 970 (C. C. E. D. Wis.). Where Congress has intended the courts of two districts to exercise concurrent jurisdiction over a river bordering both districts it has expressly so provided.[3]

2. Petitioner contends (Pet. 9, 17–18) that the requirement of section 21 (b) of the Act that the proceedings for enjoining an award be instituted in the "district in which the injury occurred"

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[2] The enabling act for Missouri makes separate provision for the territorial boundary of Missouri, which is limited to the "middle of the main channel" of the Mississippi River, and the "Jurisdiction" of the sovereign state, which extends to the entire river concurrent with other states bordering on the river. See 3 Stat. 545–546.

[3] Thus section 97 of the Judicial Code, as amended, provides that the "district courts of the southern and eastern districts [of New York] shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; * * *."

should be construed in the light of section 2 (2) which defines injury as "accidental injury or death arising out of and in the course of employment * * * ", and that since the death occurred within the territorial limits of the Eastern District of Missouri, the action was instituted in the proper district. This contention is without substance.[4] The principal purpose of section 2 (2) was evidently to limit the type of compensable injury or death. The provision was certainly not included for the purpose of defining "injury" as "injury or death" where that construction was not otherwise indicated by the context, since in subsequent sections the term "injury or death" is frequently used (see sections 5, 12, 14, 30, 39) and the words "injury" and "death" are often used in different senses. Cf. *International Mercantile Marine Co.* v. *Lowe,* 93 F. (2d) 663 (C. C. A. 2), certiorari denied, 304 U. S. 565; *Associated General Contractors* v. *Cardillo,* 106 F. (2d) 327 (App. D. C.); see sections 3, 13, 19, 44. Whether "injury" includes "death" must therefore depend on the context. And to construe "injury" to mean "injury or death" in section 21 (b) would lead to the unfortunate result of permitting the person bringing suit to choose the district in which

[4] The contention was raised by the petitioner for the first time as an "additional suggestion," by leave of the court below, in support of its motion for rehearing (Pet. 4). It was not raised in the motion for rehearing itself (R. 167–169).

to bring the action without regard to considerations of orderly procedure or the convenience of the defendants. This is a sufficient ground for rejecting the suggested construction.[5] Cf. *Sorrells* v. *United States*, 287 U. S. 435, 446; *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394.

3. Petitioner also contends that the requirement of section 21 (b) as to the place of suit is one of venue only, and that it was waived by respondent Bassett and the other defendants by failure to make timely objection. The decision of the court below rejecting this contention is in accord with the only other case dealing with the issue (*American Mutual Liability Insurance Co.* v. *Lowe* (S. D. N. Y.), decided August 21, 1935, and not officially reported) and seems to be correct.[6] Subdivision (d) of the same section, expressly providing that proceedings to enforce or enjoin an award "shall not be instituted otherwise than as provided in this section * * *," is persuasive that a limitation of power was intended, and other requirements of the section concerning the time for instituting the action and the nature of the relief

[5] The question has never been presented in any other case under the Act, and thus has given no difficulty in administration of the Act.

[6] None of the cases cited by petitioner in support of its contentions on this issue arose under the Longshoremen's and Harbor Workers' Act, and, of course, in none was there present an express prohibition, comparable to section 21 (d), against proceeding otherwise than as provided.

which may be granted have been held jurisdictional. *Mille* v. *McManigal,* 69 F. (2d) 644 (C. C. A. 2); *Pillsbury* v. *Alaska Packers 'Ass'n,* 85 F. (2d) 758 (C. C. A. 9), reversed on other grounds, 301 U. S. 174; *Associated Indemnity Corp.* v. *Marshall,* 71 F. (2d) 235 (C. C. A. 9); *id.* 71 F. (2d) 420 (C. C. A. 9); *Swofford* v. *International Mercantile Marine Co.,* 113 F. (2d) 179 (App. D. C.). Further, even if the limitation regarding the place of suit be deemed a provision for the benefit of the litigants and not strictly jurisdictional, the absolute prohibition against the institution of suit in any other manner plainly indicates an intention that the limitation could not be waived and should be strictly enforced regardless of whether timely objections were made by the defendants. Cf. *Kalb* v. *Feuerstein,* 308 U. S. 433, 441–444. It was therefore the duty of the court below to enforce the requirement on its own motion.

The question is not one of importance. So far as we are aware the *American Mutual Liability Insurance Co.* case is the only other instance in which the issue has arisen. It has been the consistent practice to institute proceedings in the district in which the injury resulting in disability or in death occurred and the failure to do so here was apparently due to the unusual circumstances of this case.

CONCLUSION

It is therefore respectfully submitted that the petition should be denied.

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AUGUST 1941.